SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

Nos. 73-1064 and 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,

Respondents.

REPLY MEMORANDUM FOR IBM

FREDERICK A. O. SCHWARZ, JR.,
One Chase Manhattan Plaza,
New York, New York 10005

SIMON H. RIFKIND,
345 Park Avenue,
New York, New York 10022
Attorneys for Petitioner

Of Counsel:

NICHOLAS DEB. KATZENBACH,
Vice President and General Counsel,
International Business Machines Corporation,
Armonk, New York 10504

JOHN H. PICKERING,
1666 K Street, N.W.
Washington, D. C. 20006

EDWARD N. COSTIKYAN,
MARK A. BELNICK,
345 Park Avenue,
New York, New York 10022

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This reply memorandum is submitted to show that the Government's arguments here why this Court should not review the district court's Contempt and Waiver Orders and the jurisdictional rulings by the court of appeals are based on errors or misconceptions about the proceedings below and their significance.

Most strikingly absent from the Government's papers is any real defense of the Waiver Order itself. That Order was entered without any findings of fact as to how "waiver" occurred, or any consideration of the circumstances. Those circumstances were: There was no intention to "waive" any privilege; the production of the documents in issue here was compelled by an order of another federal district court in a case in which the Government was not a party. The private litigant receiving the documents was ordered to hold them in confidence, and the court

ordering production held claims of privilege were not waived by the fact that these documents were inadvertently produced. Those rulings have been followed by other courts (except for the district court below). Thus, while IBM has been engaged in other antitrust cases since the documents in issue were produced, in those cases the plaintiff was not permitted access to these documents.

The concept of "waiver" adopted by the district court is fundamentally inconsistent with the standard set forth in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)—that "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"—a standard which unquestionably was not but should have been applied here.

Instead of dealing with the significance of the matters presented in light of their importance and impact on fundamental rights and the proper and efficient administration of justice, the Government opposes review with procedural arguments—cast in terms of a policy against any appellate review before there is a judgment after trial in its antitrust case. Those arguments are seriously flawed in their premises:

FIRST. The Government claims that review of the Contempt and Waiver Orders on the merits "would result in a right of appeal for *all* pretrial discovery orders". (Op. in No. 73-1065, p. 25; emphasis in original) That is not true.

Preliminarily, it is not accurate to state that a "pretrial discovery order" is involved here. The Waiver Order held IBM "waived" privilege claims by compelled, unintentional production of privileged documents. It cannot be characterized as a "discovery" order, because, under Rule 26(b)(1), Fed. R. Civ. P., "discovery" only extends to matters "not privileged". Moreover, in issue now also is a Contempt Order, which, by imposing a $150,000 daily fine, hardly resembles a "pretrial discovery order".

Rather, it is a punitive sanction which would have foreclosed any appellate review, except for the stay ordered by a unanimous Second Circuit (over the Government's opposition) after that Court held two-to-one that it was without jurisdiction to review it.

Moreover, we certainly have never claimed or suggested a "right of appeal for *all* pretrial discovery orders". We are dealing with circumstances having nothing in common with "*all* pretrial discovery orders":

> —Here, the perniciousness of the district court's "waiver" ruling is its extinction of attorney-client and work-product privileges while holding that the purpose and intention to protect those privileges, as well as an order of another court safeguarding them, are irrelevant.
>
> —Here, appellate review is sought now because, once privileged documents are disclosed to the Government, IBM and Cravath are irreparably injured and the proceedings below are irretrievably tainted. That damage cannot be undone. The Government's position is that any appellate review must be later, but that necessarily assumes there will be a judgment after trial in the Government's favor, that it will, under the Expediting Act, be reviewed by this Court, and that there can be a reversal because the Waiver Order erroneously infected the trial. Apart from the protection of rights fundamental both to the adversary system and to self-enforcement of the laws, review now rather than later eliminates a risk of trying this case twice (and that, as can be seen from the massive discovery in progress and already completed, which is outlined below, would be a tremendous effort making relatively insignificant the amount of time and effort expended in these proceedings).

—Here, the district court's Waiver Order may greatly complicate the chore of administering the progress of cases through the courts. If one federal judge can retroactively undo another federal judge's protective order under circumstances like those present here, it will be very difficult for the courts to accommodate and compromise claims in the interest of expedition because litigants will not be able to rely upon stipulated or ordered protection of rights and may instead find, as here, that compliance with the orders of one court results in a "waiver of rights" theory in another.

—Here, whatever view the Court may entertain about the reviewability of the Waiver Order standing alone (Nos. 72-1173, 72-1661, 72-1662), the effort by the Government and the district court further to shield it and the Contempt Order from review by the "civil" trappings adopted for the Contempt Order should not be tolerated. It is one thing to recognize arguably discretionary powers, but quite another to let stand an arbitrary exercise of power designed to thwart any review. What happened below, contrary to the Government's suggestion, just had no relationship to what ordinarily happens in "*all* pretrial discovery orders", and it is precisely because this is an extraordinary situation that the issues of reviewability are different from those present in other situations.

In sum, grant of review here under the circumstances would not depart from accepted tests concerning what can be reviewed and what cannot. On the other hand, the denial of a review on the merits is dangerous as a precedential matter. Then there would be no ruling on the propriety of what happened below, and what happened below (i) should not be immunized from review, (ii) offends the proper and efficient administration of justice for this and other cases, and (iii) extinguishes rights this Court has long protected, rights which were here correctly recognized by one federal district court and then undone by another.

SECOND. It is wrong for the Government to assert here that it has consistently adhered to an "unchanged contention that under the rule of finality, pretrial discovery orders are not appealable until final judgment." (Op. in No. 73-1064, p. 6, n.5, and Op. in No. 73-1065, p. 25, n.19) In successfully resisting review and stay of the Waiver Order the Government consistently urged that review could now be obtained if IBM or its representative would risk going into contempt and thereby demonstrate the good faith nature of the opposition to the Waiver Order. Yet when Government counsel sought the Contempt Order, they did everything in their power to obtain a non-reviewable order. Not only did Government trial counsel flatly oppose IBM's "Motion for Entry of a Plainly Appealable Contempt Order" (II App. F, at 138a; II App. K), he also urged that the Contempt Order be issued against IBM, rather than its representatives, and that the adjudication be for civil contempt only.

Thus, the Government's suggestion here that it was "cautioning" the district court that a civil contempt was "interlocutory and not appealable" (Op. in No. 73-1064, p. 3) is at best a less than candid statement of its position since it was affirmatively doing everything it could to block the route to appellate review it once held open. And the Government's statement that its position is "unchanged" was undercut by Government trial counsel's urging the district court that its prior position in this Court and in the Second Circuit should not be "looked at or honored". (II App. B, at 15a)

Our point here is not that IBM or its counsel were misled or misinformed by Government counsel as to what kinds of contempt are appealable. The point is that something more should be expected of a Department of Justice, particularly when fundamental rights are at stake, than to suggest to this Court and to the Second Circuit that review could be obtained by the contempt route (and by the very suggestion invite recourse thereto), and then to

use every opportunity in the district court to block an appeal by labeling as "civil" what is at least partly an order of "criminal" contempt, because it was entered to vindicate the authority of the court and punish IBM for defiance, without regard to what, if any, harm was caused the Government as a litigant.

The point is that the substance of what was done here cannot be obscured or insulated from review by formalistic labels.

THIRD. The Government claims it is invoking "the rule against interlocutory appeals in government antitrust cases" because discovery below is "being delayed" (Op. in No. 73-1065, p. 15 and p. 24, n.18) by noncompliance with the district court's Waiver Order. The impression left by that assertion—that matters are at a standstill pending resolution of IBM's efforts to obtain review of the Waiver and Contempt Orders—is patently erroneous:

> (a) Discovery in the district court concerning the antitrust merits has been going forward without interruption stemming from these proceedings to review the Contempt and Waiver Orders, and the volume and scope of that discovery is enormous.* The plain facts are that, contrary to the impression given by the Government's papers here, the parties are en-

* The district court's Waiver Order was entered September 26, 1972. Since that time, there have been 27 days spent in pretrial conferences before Judge Edelstein, almost all of which were concerned with pretrial discovery on the antitrust merits. That discovery is continuing to this day at a very rapid pace. Between October 1972 and the end of last month (April 1974)—the time during which the Government suggests here that matters are at a standstill because of these proceedings—there have been 429 depositions taken covering 55,720 transcript pages. While that discovery undertaken by the parties is covering the entire computer industry, 100 deposition days and 12,316 pages of transcript during that period involved depositions of IBM employees.

gaged in all the discovery they can presently handle and that the pending proceedings in this matter have not delayed that discovery in the slightest.*

(b) IBM and Cravath have also done everything they could, and everything that has been asked of them, to expedite these proceedings. Initially, it was the Government which waited 17 months before asserting its waiver of privilege theory in the district court (doing so long after it had *agreed* to accept as production to it microfilm of all documents produced to the private party *except* the privileged documents). Even now, whatever credence might otherwise have been put in the Government's assertion of delay, that is completely undercut by the Government's long and unexplained delay in filing its present responses. The instant review applications, at the Government's request, were expeditiously filed by IBM and Cravath on January 7, 1974, within 21 days after the December 17, 1973, decision of the Second Circuit holding that it was without jurisdiction to

* Moreover, the documents covered by the Waiver Order (and a subsequent Government motion seeking a determination that IBM waived privilege claims to still more documents) are a minute fraction of all the documents produced by IBM in connection with this litigation. The volume of documents demanded from and produced by IBM has been unprecedented. Particular claims of privilege by the Government and by IBM are being reviewed by special masters appointed by the district court. The documents in issue here are not now part of the privilege proceedings before the special masters, however. The district court rejected the recommendation made by both IBM and the Government (Op. in No. 73-1065, pp. 29, 38-39), that, pending appellate resolution of this controversy, the documents in issue here be submitted to the special masters to test whether IBM's privilege claims were properly asserted. While progress is being made in the special master proceedings, they will not be completed for some time, and there is no conceivable or practical reason why access to the documents in issue here need be had on any different schedule than that being followed in the special master proceedings.

review the actions of the district court. Yet the Government waited until April 26, 1974, to file its responses in Nos. 73-1064 and 73-1065 and until April 30 to file in No. 73-1066, taking some 49 and more days beyond the 30-day period allowed for response under Rules of this Court, without giving any reasons therefor and without seeking an extension.* It is plain that neither the proceedings here nor the progress of the massive and complex antitrust action in the district court are being delayed by IBM's and Cravath's efforts to protect their fundamental attorney-client and work-product privileges.

FOURTH. The Government relies here (Op. in No. 73-1065, p. 19) on that portion of the opinion of the Court of Appeals which held that IBM "waived" its right to insist that there cannot be an order of "civil" contempt because IBM objected to the Government's offer to introduce evidence of harm to it. (II App. I, pp. 164a-165a) Then, on the next page of that brief (Op. in No. 73-1065, p. 20), the Government relies on that part of the opinion of the Court of Appeals which held that it would be "impossible to determine what harm is being suffered here by failure to provide this material for discovery" (II App. I, p. 166a).

The error and contradiction in the Government's position are self-evident. What the court of appeals thought was "impossible" to do—prove harm from nonreceipt of the documents—was precisely what the district court ruled irrelevant to the contempt hearing and what the Government recognized it must do to support an order of "civil" contempt.

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* The Government's responses were not timely even if time is computed from the district court's explicit denial on March 6, 1974, of Cravath's motion to intervene as of right and the filing on March 13, 1974, of the Supplemental Jurisdictional Statement in No. 73-1066.

When the Government offered what it claimed was proof of harm, we objected and the evidence was excluded. That objection is used by the Government to construct its second "waiver" theory, which is that, by objecting to its offer of proof, we "waived" our right to contest on appeal the district court's holding that we "waived" our privilege claims because we were responsible for there being no evidence of harm to support an order of "civil" contempt. That theory is wrong, as the Government well knows. It was the *Government* which sought an order blocking discovery concerning its fanciful claim that failure immediately to have the documents in issue was damaging it, and it was the order issued on that request which made the question of harm irrelevant to the proceedings below. Nevertheless, the *Government* inconsistently then tried to prove harm, and IBM's objection to the offer was made solely to conform the scope of the proceeding to what had previously been ordered at the *Government's* request.*

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* Error in other aspects of the Court of Appeals' disposition of this matter on jurisdictional grounds is treated in our Petition for a Writ of Certiorari in No. 73-1065. The Government's apparent suggestion here of still another "waiver" theory—that some issue may not be before the Court because we did not file a Notice of Appeal to this Court from the Contempt Order (Op. in No. 73-1064, p. 2, n. 1; Op. in No. 73-1065, p. 3, n. 2, p. 26)—makes no sense under any view the Government has heretofore advanced about the requirements of the Expediting Act. This "waiver" theory also cannot be reconciled with the Government's earlier concession that this Court has jurisdiction to review under the All Writs Act, 28 U.S.C. § 1651. (Op. in No. 72-1661, p. 3) The proliferation of "waiver" theories should be checked by this Court, for "waiver" is too important and too serious a doctrine to be so readily grasped at for the purpose of defeating both substantive rights and appellate review.

CONCLUSION

For the reasons stated here and in our prior papers, this Court should grant appellate review of the merits of the Contempt and Waiver Orders and of the jurisdictional rulings by the court of appeals.

May 6, 1974.

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
One Chase Manhattan Plaza,
New York, New York 10005
(212) HA 2-3000

SIMON H. RIFKIND,
345 Park Avenue,
New York, New York 10022
(212) 935-8000

Attorneys for Petitioner

Of Counsel:

NICHOLAS DEB. KATZENBACH,
Vice President and General Counsel,
International Business Machines Corporation,
Armonk, New York 10504
(914) 765-4810

JOHN H. PICKERING,
1666 K Street, N.W.
Washington, D. C. 20006
(202) 872-6200

EDWARD N. COSTIKYAN,
MARK A. BELNICK,
345 Park Avenue,
New York, New York 10022
(212) 935-8000